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A Tale of Two Standards: Antitrust, the Public Interest, and the Television Industry

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A Tale of Two Standards: Antitrust, the Public Interest, and the Television Industry

by EDWARD P. SANGSTER*

I
Introduction

In two cases, both named *United States v. National Association of Broadcasters*,[1] individual broadcasters found themselves caught in the middle of a tug-of-war between two governmental departments regarding restrictions on television commercials. While one branch of government, the Justice Department, seeks to promote competitive advertising practices regardless of the possible increase in the commercialization of television, another governmental agency, the Federal Communications Commission (FCC or Commission), has traditionally penalized broadcasters for allowing too many commercials.[2] Competitive forces may compel broadcasters to increase the amount of commercial time, but in doing so stations may violate the FCC's public interest requirement and conceivably lose their licenses if they become overly commercialized.[3] Complicating the issue, the FCC recently removed its formal restrictions on television advertising.[4] It is now unclear whether broadcasters have any duty to limit advertising.[5]

By examining the decisions in *Broadcasters I* and *Broadcasters II*, this note analyzes the two standards of public interest

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1. United States v. National Ass'n of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982) [hereinafter cited as *Broadcasters I*]; United States v. Nat'l Ass'n of Broadcasters, 553 F. Supp. 621 (D.D.C. 1982) [hereinafter cited as *Broadcasters II*].

2. *See infra* text accompanying notes 100-20.

3. *Id. See also* notes 10-15 and accompanying text.

4. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Final Rule, 49 Fed. Reg. 33,588 (1984) [hereinafter cited as Final Rule].

5. *See infra* notes 135-71 and accompanying text.

which have been applied to the broadcasting industry: one standard dictated by antitrust law and the other mandated by the Communications Act.[6] The note examines the results of applying the antitrust laws to the television industry and contrasts this with the result that the policies of the Communications Act[7] might favor. The note then discusses the ramifications of *Broadcasters I* and *Broadcasters II*, which led to the repeal of the Television Code of the National Association of Broadcasters,[8] in light of the recent deregulation of television advertising.[9] The note concludes that the *Broadcasters* decisions have substantially undermined the FCC's rationale for deregulating television advertising.

II
Background

The Federal Communications Commission is vested with the power to issue, renew, or revoke licenses to broadcast.[10] The FCC issues new broadcasting licenses to individuals or companies that the FCC determines are likely to operate in the public interest.[11] At least once every five years, a television station must renew its license.[12] The FCC will renew the license only if the station operated in the public interest during the prior license period.[13]

Although the government requires stations to operate in the public interest, it has never provided specific guidelines to assist broadcasters in fulfilling their public interest requirement.[14] It is clear, however, that the FCC has traditionally

6. 47 U.S.C. §§ 151-609 (1983).
7. 47 U.S.C. §§ 307, 309 (1983).
8. THE TELEVISION CODE OF THE NATIONAL ASSOCIATION OF BROADCASTERS (19th ed. amended Sept. 1977) [hereinafter cited as CODE], *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING 576 (F. Kahn 3d ed. 1978) [hereinafter cited as Kahn].
9. *See infra* notes 131-71 and accompanying text.
10. 47 U.S.C. § 303 (1983).
11. *Id.* § 307(a).
12. *Id.* § 307(c).
13. *Id.*
14. The statutory standard no doubt leaves wide discretion and calls for imaginative interpretation. Not a standard that lends itself to application with exactitude, it expresses a policy, born of years of unhappy trial and error, that is "as concrete as the complicated factors for judgment in such a field of delegated authority permit."

FCC v. R.C.A. Communications, Inc., 346 U.S. 86, 90 (1953) (quoting F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)). *See also* Note, *The Proposed Communica-*

regarded excessive advertising as detrimental to the public interest.[15]

In 1923, licensed broadcasters formed the National Association of Broadcasters (NAB), a voluntary industry trade association.[16] The NAB established a code of conduct for its members in 1952. The Television Code of the National Association of Broadcasters (Code) has been updated several times, most recently in 1978.[17] It set forth eight standards regarding programming and seven standards regarding television advertising. The programming standards dealt with the type and length of programs, provided standards regarding children's programming, and required conformity to a general standard of good taste.[18] The advertising standards regulated the total amount of time devoted to commercials, the number of consecutive commercials, and the number of program interruptions, and provided general guidelines regulating good taste, deceptive advertising, and the making of representations regarding health and safety.[19]

All NAB members and many nonmembers subscribed to, or followed, the Code;[20] in 1978, these stations comprised more than sixty-five percent of all commercial television stations.[21] Furthermore, Code-subscribing stations adhered strictly to the Code's time limits regarding advertising; an NAB study

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tions Act Rewrite: Potomac Deregulatory Fever v. The Public Interest, 48 CIN. L. REV. 476, 480 (1979).

15. *See infra* notes 100-20 and accompanying text.

16. Kahn, *supra* note 8, at 63.

17. *Broadcasters I*, 536 F. Supp. at 152 n.2. The NAB's membership includes the three major networks and over 500 independent television stations. *Id.*

18. CODE, *supra* note 8, at 576. The NAB refused to release copies of the 1978 amended Code, which also was the subject of *Broadcasters I* and *Broadcasters II*. However, the two pertinent provisions are essentially the same. *See generally* Brosterhous, *United States v. National Association of Broadcasters: The Deregulation of Self-Regulation*, 35 FED. COM. L.J. 313 (1983).

"Family viewing hours" standards, which were enacted by the NAB in 1975, were held to constitute an unconstitutional infringement of first amendment rights. Writers Guild of Am. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated on other grounds*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980). The lower court found that because the FCC was extensively involved in enacting them, the regulations constituted governmental censorship. That court's decision was vacated, however, on the grounds that the FCC, not the federal courts, had jurisdiction over the plaintiff's complaints. *See also infra* note 179.

19. CODE, *reprinted in* Kahn, *supra* note 8, at 576. *See also Broadcasters I*, 536 F. Supp. at 153 n.10.

20. The public watched 85% of its television on Code-subscribing stations. *Broadcasters I*, 536 F. Supp. at 153.

21. *Id.*

showed that, in a sample consisting of over 71,000 hours of television broadcast by NAB members, the stations complied with the advertising time limits during over ninety-nine percent of those hours.[22]

The NAB promulgated and enforced its specific standards ostensibly to assist members in meeting their public interest requirement. The government, through the FCC, tacitly accepted the NAB's standards.[23] In some instances, compliance with the Code essentially satisfied certain aspects of the broadcasters' public interest requirement.[24]

In July of 1979, the U.S. Department of Justice filed an antitrust suit against the NAB under section 4 of the Sherman Act.[25] Most provisions of the Code did not restrain competition, as the Code attempted to increase program quality while at the same time protect viewers from deceptive advertising and questionable representations concerning health and safety. The government, however, contended that three of the NAB Code restrictions dealing with commercials unreasonably restrained trade.[26] It argued that the Code restricted the available amount of commercial time; consequently, the price of advertising remained artificially high.[27]

The trial court granted summary judgment in favor of the government with regard to one restriction, which prevented the advertising of more than one product during commercials less than sixty seconds in duration.[28] In so ruling, the court ignored the role that the Code played in helping NAB members satisfy their public interest requirement. While it recognized that, for the most part, the Code was promulgated to provide "broadcasters with guidelines for meeting their statutory obligation[29] to serve the public interest,"[30] the court stated

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22. Notice of Inquiry and Proposed Rule Making, Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 48 Fed. Reg. 37,239, app. C (1983) [hereinafter cited as Revision of Commercialization Policies].

23. *See, e.g., In re* NBC, 20 F.C.C.2d 644, para. 5 (1969). Compliance with the NAB total commercial time limit created a rebuttable presumption that the broadcaster had satisfied that aspect of its public interest requirement.

24. *Id.*

25. 15 U.S.C. § 4 (1973).

26. *Broadcasters I*, 536 F. Supp. at 152.

27. *Id.*

28. *Id.* at 163.

29. The "statutory obligation" the court referred to is set forth in 47 U.S.C. §§ 307 and 309 (1983).

30. *Broadcasters I*, 536 F. Supp. at 153 n.10. *See generally* CODE, *supra* note 8.

that it could not consider the beneficial aspects of the Code when evaluating whether the provision unreasonably restrained trade.[31]

The NAB appealed the summary judgment ruling, but before a decision was rendered, the Justice Department and the NAB settled the case. The NAB agreed to rescind its Code and agreed to the entry of an unfavorable consent decree. In return, the Justice Department agreed not to oppose the motion of the NAB to dismiss the summary judgment as moot.[32]

The Tunney Act[33] requires that settlement of antitrust cases be approved by the district court. Under the Act, a court may approve the consent decree only if the entry of a consent decree would be in the "public interest."[34] In approving the consent decree between the Justice Department and the NAB, the court in *Broadcasters II* construed the public interest to consist exclusively of two factors: the policy of encouraging settlement of antitrust cases and the policy of increasing competition.[35] As it had done in granting summary judgment in *Broadcasters I*, the court ignored the possibility that the provisions of the Code might have served the public interest as defined by the Communications Act.[36]

In order to understand the court's ruling, it is necessary to first examine the antitrust law on which the court based its decision, and how it was applied in *Broadcasters I* and *Broadcasters II.*

III
Antitrust Law

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[37] Although the statute expressly prohibits "[e]very contract, combination . . . or

31. *Broadcasters I,* 536 F. Supp. at 166-68.
32. *Broadcasters II,* 553 F. Supp. at 622.
33. 15 U.S.C. § 16(b)-(h) (1982).
34. *Id. See generally* Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility with Executive Discretion,* 35 HASTINGS L.J. 133 (1983).
35. *Broadcasters II,* 553 F. Supp. at 623-24. The same judge who granted summary judgment in *Broadcasters I* approved the consent decree.
36. 47 U.S.C. §§ 151-609 (1983).
37. 15 U.S.C. § 1 (1973).

conspiracy, in restraint of trade,"[38] the Supreme Court has construed the statute to prohibit only *unreasonable* restraints of trade.[39] This interpretation of the statute is called the "rule of reason."[40]

In *Board of Trade v. United States*,[41] the Supreme Court articulated the following test for determining whether a restraint will be deemed unreasonable.

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[42]

Four types of agreements are considered to be unreasonable per se: (1) price fixing,[43] (2) market division agreements,[44]

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38. *Id.*

39. Standard Oil Co. v. United States, 221 U.S. 1, 58-60 (1911).

40. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 65, at 171-74 (1977).

41. 246 U.S. 231 (1918).

42. *Id.* at 238. Although *Board of Trade* states the classic test for determining whether a restraint is unreasonable, its result is one of the foremost aberrations from the evolution of antitrust law. The *Board of Trade* test supposedly restricted the court's consideration of reasonableness to factors indicating whether the restraint decreased competition, but the Court apparently considered other factors as well.

In *Board of Trade*, the suspect restriction temporarily fixed the price of grain in transit to Chicago by forbidding members of the exchange from buying grain when the exchange was closed. The Court upheld the restriction, arguably on the basis that the restraint was modest in comparison to the competing advantages. L. SULLIVAN, *supra* note 40, § 65, at 177-79.

43. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Price fixing may consist of an explicit agreement to charge a certain price for a product. More often, collaborators will engage in indirect methods to fix prices such as controlling the supply of a product. In *Broadcasters I*, 536 F. Supp. at 155-63, the court analyzed the alleged restriction under a supply limitation theory.

44. Market division agreements restrict competition by allocating certain sales ter-

(3) group boycotts,[45] and (4) tying agreements.[46] If a court categorizes an agreement as one of the four types of per se agreements, a Sherman Act violation is conclusively established, and a court need not inquire into the possible anticompetitive effects of such a restriction.[47]

Thus, there are two possible analyses used to determine whether restraints of trade violate the Sherman Act. The Supreme Court has characterized these restraints as falling into one of two "complementary categories:"

> In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.[48]

IV
Application of the Antitrust Laws to the NAB

The court applied both the per se rule and the rule of reason in *Broadcasters I*, finding that the Code limitation concerning the advertisement of more than one product during commercials constituted an unlawful restraint of trade. It is important to examine the reasoning the trial court used in both *Broadcasters I* and *Broadcasters II*[49] in order to determine whether the court properly applied antitrust law. These decisions involved two motions heard by the same court. In the first, involving a motion for summary judgment, the court used a narrow definition of the public interest and found a per se vio-

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ritories exclusively to certain producers or sellers. *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

45. Group boycotts covered by the per se rule are difficult to define. In general, group boycotts consist of concerted efforts by a group of businesspersons to prevent other businesspersons from entering the level of business (for example, wholesale trade) by denying potential entrants access to needed resources. Thus, a group of wholesalers of "widgets" prevents other people from becoming widget wholesalers by denying them access to widgets. *See* L. SULLIVAN, *supra* note 40, at 229-65. *See also* Montague & Co. v. Lowry, 193 U.S. 38 (1904).

46. "[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958).

47. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

48. *Id.*

49. For another discussion of the court's rulings, see Brosterhous, *supra* note 18.

lation of the Sherman Act.[50] In the second, involving a motion for approval of settlement and entry of a consent decree, the same court employed the same narrow definition of public interest to approve the terms of the settlement.[51]

A. The Motion for Summary Judgment

The United States filed a complaint on July 14, 1979, alleging that three provisions of the Television Code of the NAB violated section 1 of the Sherman Act.[52] The first restrictions, called "advertising standards" by the court, limited network-affiliated stations to nine and one-half minutes of commercials per hour during prime time and imposed similar time limits during other specified periods.[53] The second set of constraints put at issue were labelled "program interruption standards," and these limited the number of consecutive announcements during any interruption of a program.[54] During prime time, network-affiliated stations could have four interruptions, during which a station could broadcast a maximum of four commercials and one noncommercial announcement.[55] The third challenged restriction, referred to as the "multiple product standard," prohibited the broadcasting of any commercial of less than sixty seconds duration which advertised more than one product.[56]

Both parties moved for summary judgment. The government argued that the questioned Code provisions restrained the supply of advertising time.[57] As an artificial restriction of supply, the Code allegedly raised the price of available adver-

50. *Broadcasters I*, 536 F. Supp. at 163.

51. *Broadcasters II*, 553 F. Supp. at 625.

52. 15 U.S.C. § 1. *See Broadcasters II*, 553 F. Supp. at 622.

53. CODE, *reprinted in* Kahn, *supra* note 8, at 590-91, § 2(A)(1), XV § 2. Prime time was defined as "a continuous period of not less than 3 consecutive hours . . . as designated by the station between the hours of 6:00 p.m. and midnght." *Id.* Stations not affiliated with a network were permitted to have more advertising time per hour. *Id.* Both independent and network affiliate stations had similar restrictions during children's viewing hours. *Id.* Stations were limited to 12½ minutes of commercials per hour during weekday children's viewing hours and 9½ minutes per hour during children's viewing hours on the weekend. *Id.* The court did not define "children's programs," apparently feeling that such a distinction was irrelevant. *See Broadcasters II*, 553 F. Supp. at 624.

54. *Broadcasters I*, 536 F. Supp. at 158-59.

55. *Id.* at 153-54. Public service announcements did not count as an "announcement."

56. *Id.* at 154.

57. *Id.* at 152.

tising time and, hence, constituted a per se violation of the Sherman Act.[58] The NAB primarily argued that the Code served the public interest and that various governmental bodies had endorsed the Code restrictions.[59] The NAB also asserted that adherence to the Code was voluntary, that the restrictions were advisory and not restrictive, and that the Code had no anticompetitive purpose.[60]

Although the parties apparently felt that the three types of restrictions presented identical issues, the court astutely analyzed each restriction separately.[61] The court held that the advertising standards and the interruption standards were not per se violations of the Sherman Act.[62] Restraints of trade which are not per se violations must then be evaluated under the rule of reason.[63] Thus, the court found that the effects of the advertising and the interruption standards on competition presented triable issues of fact and denied both parties' motions for summary judgment with respect to these standards.[64]

In contrast, the court held that the multiple product standard constituted a per se violation of the Sherman Act.[65] The court reasoned that

> this standard . . . has the effect of compelling some, perhaps many, advertisers to purchase more commercial time than their economic interests might dictate. In thus artificially increasing the demand for commercial time—and perhaps limiting its supply as well. . .—the standard raises both the price of time and the revenues of the broadcasters . . . .[66]

In other words, the standard required advertisers who wished to promote more than one product to purchase at least sixty seconds of commercial time; without the Code restriction, such advertisers might have purchased fewer seconds of advertising to promote the same number of products.

The court focused exclusively on the restriction's possible effects on competition. The court dismissed the NAB's defenses of voluntariness,[67] governmental approval,[68] and lack of anti-

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58. *Id.*
59. *Id.* at 166-69.
60. *Id.* at 163-66.
61. *Id.* at 154 n.18.
62. *Id.* at 157-59.
63. *See supra* notes 37-48 and accompanying text.
64. *Broadcasters I*, 536 F. Supp. at 157-59.
65. *Id.* at 163.
66. *Id.* at 160.
67. *Id.* at 163-65. The court did not consider the defense that the Code was of a

competitive purpose.[69] Although the court realized that the offending provisions of the Code might serve legitimate purposes, it explicitly refused to consider the beneficial aspects of the restrictions.[70]

The court's refusal to consider alternative benefits provided by competitive restrictions is mandated by the holding in *National Society of Professional Engineers v. United States*.[71] This case enunciated the policy that in antitrust cases the public interest is served solely by increasing competition and any other considerations are irrelevant.[72] This holding would logically apply to the case against the NAB. Had the court been able to consider the possible benefits of the Code restriction, its decision might have been different. In short, the narrow conception of public interest mandated by the antitrust laws compelled the court to find a per se violation, without consideration of any other competing "public interests."

B. Approval of the Consent Decree

A consent decree is essentially a contract between the government and the defendant to terminate the antitrust litigation.[73] Settling a case by consent decree can be advantageous to the defendant. The Clayton Act[74] allows a plaintiff in a private action for injuries stemming from an antitrust violation to use the final judgment in an antitrust action brought by the United States against the same defendant as prima facie evidence of such violation.[75] Thus, if judgment against the defendant is entered in an antitrust suit brought by the United States, private plaintiffs will find it very easy to establish an antitrust violation. Private plaintiffs cannot, however, use a

voluntary nature. "It is, indeed, difficult to see why legal unenforceability or lack of formal sanctions should be considered a valid defense." *Id.* at 164.

68. *Id.* at 168-69. The court stated that even if the NAB could show that certain governmental entities approved of the Code, such approval did not exempt the NAB from the scope of the antitrust laws. Such an exemption can be granted only by Congress. *Id.*

69. *Id.* at 165-66. The court noted that there was conflicting evidence regarding the purpose of the Code. The court stated that in any case the government did not have to present evidence of anticompetitive purpose if the Code had an anticompetitive effect.

70. *Id.* at 166-68.

71. 435 U.S. 679 (1978).

72. *Id.*

73. S. REP. NO. 298, 93d Cong., 1st Sess. 5 (1973).

74. 15 U.S.C. § 16(a) (1982).

75. *Id.*

consent decree or consent judgment as prima facie evidence in a later suit, if that judgment or decree was entered before any testimony had been heard.[76] "The purpose behind the consent decree exception . . . is to induce prompt capitulation by antitrust defendants."[77]

Understandably, the NAB wished to prevent potential private plaintiffs from gaining such an advantage. After the court ruled that the multiple product standard was a per se violation of the Sherman Act, the parties entered a consent decree. By its terms, the government agreed to forego the benefits of the summary judgment if the NAB would simply eliminate the offensive restrictions.[78]

The district court can only approve a consent judgment if it finds that the entry of a consent judgment is in "the public interest."[79] The statute does not define public interest, but a brief examination of the background of the Tunney Act demonstrates that it was intended to ensure that consent decrees truly increase competition.[80]

1. *Background of the Tunney Act*

Before the enactment of the Tunney Act, many consent decrees were ineffective; compliance with the terms of the consent decree often failed to increase competition,[81] yet the government, by the decree, waived the public's rights to governmental enforcement.[82] The Tunney Act was designed to

76. *Id.*

77. *Broadcasters II*, 553 F. Supp. at 623 n.5.

78. *Id.* at 625-27.

79. *See also* Brosterhous, *supra* note 18, at 335-36. For an excellent discussion of the standards of judicial review of consent decrees before and after the passage of the Tunney Act, see Note, *supra* note 34, at 135-42.

80. Eighty percent of all antitrust complaints filed by the Justice Department are settled by the defendant agreeing to the entry of a consent decree. S. REP. NO. 298, 93d Cong., 1st Sess. 5 (1973). A consent decree requires a defendant to comply with certain conditions, but the defendant does not admit to having violated the antitrust laws. In theory, the terms required by the consent decree eliminate the antitrust violation and increase competition. *Id.*

81. *See, e.g.*, 119 CONG. REC. 24,597-98 (1973) (statement of Senator Tunney). *See also Consent Decree Bills: Hearings on H.R. 9203, 9947, and S. 782 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 103-25 (1973) (testimony of Dan McGurk) [hereinafter cited as *Consent Decree Bills*].

82. In one case, Congressman James Stanton alleged that a certain consent decree merely required the defendant to change the *name* of the offending practice, but it did not require abolition of the practice itself. *Consent Decree Bills, supra* note 81, at 46-61 (statement of James V. Stanton).

prevent ineffective consent decrees by exposing the negotiation process to public scrutiny.[83] In addition to requiring a sixty-day advance publication of the terms of the proposed consent decree, the statute requires a court to evaluate independently whether the judgment is in the public interest.[84]

The Tunney Act implicitly assumes that members of the Justice Department might negligently or intentionally draft ineffective consent decrees. Indeed, this theme was repeatedly raised during the Congressional hearings to justify the need for the legislation.[85] Therefore, the drafters of the Act used the words "public interest," clearly intending them to mean the public interest as defined in antitrust case law.[86] At one point in the legislative process, the statute was amended to read "the public interest as defined by law." The purpose of the amendment was to "make it clear that the court is to define public interest in accordance with the antitrust laws."[87] Congress subsequently deleted the words "as defined by law" in order "to clarify the intention not to change case law construing the 'public interest' in cases involving the antitrust laws or antitrust provisions of other laws . . . . Preservation of antitrust precedent rather than innovation in the usage of the phrase, 'public interest,' is, therefore, unambiguous."[88]

Thus, Congress intended that judicial precedent would guide the courts in evaluating whether a consent decree is in the public interest. In *Broadcasters I*,[89] the court applied the definition of the public interest in antitrust law as set forth by the Supreme Court in *National Society of Professional Engineers v. United States*[90]:

> [T]he purpose of the [antitrust] analysis is to form a judgment

83. 119 CONG. REC. 24,597-99 (1973) (statement of Senator Tunney).

84. 15 U.S.C. § 16(b)-(f) (1982).

85. *See, e.g., Consent Decree Bills, supra* note 81, at 129 (testimony of Howard Luric) ("Without suggesting that the Department [of Justice] is corrupt or rotten to the core—neither of which it is—one can suggest that it is not free from improper political influence."). Another witness testified, "By definition, antitrust violators wield great influence and economic power. They often bring significant pressure to bear on government, and even on the courts, in connection with the handling of consent decrees. The public is properly concerned whether such pressure results in settlements which might shortchange the public interest." *Id.* (testimony of Hon. J. Skelly Wright, *cited in* 119 CONG. REC. 24,597 (1973) (statement of Senator Tunney)).

86. S. REP. NO. 298, 93d Cong., 1st Sess. 2-3 (1973).

87. *Id.* at 3.

88. H.R. REP. NO. 1463, 93d Cong., 2d Sess. 11 (1974).

89. 536 F. Supp. at 167.

90. 435 U.S. 679.

> about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.[91]

2. *Application of the Tunney Act in* Broadcasters II

In the context of antitrust consent decrees, the term public interest acquires a much narrower meaning than it might otherwise suggest. In evaluating whether the public interest is served by a consent judgment, the court examines the record of negotiation to ensure that the defendant has not unduly influenced the Department of Justice into accepting the agreement and that the judgment will effectively further the goal of the antitrust laws, i.e., increased competition.

Therefore, it appears that the court in *Broadcasters II* correctly excluded all information not relating to the competitive impact of the consent decree.[92] The question, then, is whether the application of the narrow public interest furthered by the Sherman Act has frustrated a broader, more pervasive public interest—namely, the public interest governing broadcasting.

V
The Public Interest in Broadcasting

The Communications Act requires that radio and television stations obtain a license in order to broadcast.[93] The FCC has great but not unlimited discretion in determining whether to grant or renew a broadcast license.[94]

> [T]he Commission shall determine, in the case of each application filed with it . . . , whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission . . . shall find that public interest, convenience, and necessity will be served by the granting [of the license], it shall grant such application.[95]

"This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly,

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91. *Id.* at 692.

92. For example, the court ignored its effect on children's television. *Broadcasters II*, 553 F. Supp. at 624. *See also* Brosterhous, *supra* note 18, at 322-28.

93. 47 U.S.C. § 301 (1983).

94. Pottsville Broadcasting Co. v. FCC, 105 F.2d 36, 40 (D.C. Cir. 1939), *rev'd on other grounds*, 309 U.S. 134 (1940).

95. 47 U.S.C. § 309(a) (1983).

but expansive'."[96] It is clear that radio and television stations must operate in the public interest,[97] and the FCC will not renew the license of a station which has failed to meet this obligation.[98] It is not clear, however, what conduct comports with the "public interest, convenience, and necessity." Cases seldom define these terms and rarely discuss any factors used to determine whether a station has operated in the "public interest." Furthermore, the deregulation of radio and recent deregulation of television indicate that traditional standards of public interest may be changing.[99]

Although it has been said that "[t]his vague standard has been used . . . by FCC commissioners to justify whatever they have chosen to do,"[100] the Federal Radio Commission (FRC or Radio Commission) and its successor, the FCC, have, until recently, consistently decried excessive advertising as being detrimental to the public interest. In 1928, the fledgling FRC promulgated its first comprehensive interpretation of the admittedly vague standard of "public interest, convenience, and necessity."[101] Regarding advertising, the Radio Commission said:

> [W]hile it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasting stations are not given these great privileges [to broadcast] by the United States Government for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public.[102]

Initially, then, the Radio Commission viewed advertising as a necessary evil; stations needed advertising to financially support their programs, but the FRC believed commercials detracted from programming which the stations were supposed to present for the public benefit.[103] The FRC said, "[t]he em-

96. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969).

97. Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 49 (D.C. Cir. 1972).

98. FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946). *See also* Report and Statement of Policy Res: Commission *en banc* Programming Inquiry in Docket No. 91874, 44 F.C.C. 2303, 2310 (1960) [hereinafter cited as Report and Statement of Policy Res].

99. *See infra* notes 135-71 and accompanying text.

100. B. COLE & M. OETTINGER, RELUCTANT REGULATORS 4 (rev. ed. 1978).

101. Kahn, *supra* note 8, at 49-50.

102. Statement Made by the Commission on August 23, 1928, Relative to Public Interest, Convenience or Necessity, 2 F.R.C. Ann. Rep. 166 (1928), *reprinted in* Kahn, *supra* note 8, at 53.

103. *Id.* at 50-55.

phasis must be first and foremost on the interest, the convenience and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser."[104]

Several years later, the FRC attempted to redefine and clarify its interpretation of public interest. *In re Application of Great Lakes Broadcasting Co.*[105] represents the best known of the FRC's early interpretations of public interest, convenience, and necessity. Regarding advertising, the FRC stated:

> [T]he amount and character of advertising must be rigidly confined within the limits consistent with the public service expected of the station.
>
> The service to be rendered by a station may be viewed from two angles, (1) as an instrument for the communication of intelligence of various kinds to the general public by persons wishing to transmit such intelligence, or (2) as an instrument for the purveying of intangible commodities consisting of entertainment, instruction, education, and information to a listening public.[106]

Thus, the FRC continued to view advertising as a necessary evil. It said, "The commission must, however, recognize that, without advertising, broadcasting would not exist, and must confine itself to limiting this advertising in an amount and in character so as to preserve the largest possible amount of service for the public."[107]

In 1946, the FCC, acting under authority of the Communications Act of 1934,[108] issued a policy statement regarding programming, which is commonly referred to as the Blue Book.[109] The Blue Book extensively analyzed problems arising from "advertising excesses" in the broadcasting industry. In it, the FCC reiterated the concerns of the Radio Commission regarding the conflict between the public interest and advertisements. The FCC noted that

> the fact that advertisers have a legitimate interest and place in the American system of broadcasting does not mean that broadcasting should be run solely in the interest of the adver-

104. *Id.* at 55.
105. 3 F.R.C. ANN. REP. 32 (1929), *reprinted in* Kahn, *supra* note 8, at 56.
106. *Id.* at 57.
107. *Id.* at 61.
108. 47 U.S.C. §§ 151-609 (1983).
109. Public Service Responsibility of Broadcast Licensees (Mar. 7, 1946), *reprinted in* Kahn, *supra* note 8, at 132-216.

> tisers rather than that of the listeners. Throughout the history of broadcasting, a limitation on the amount and character of advertising has been one element of "public interest."[110]

Again, the Commission echoed the theme that advertising represented a necessary evil required to support programming, which did, in fact, benefit the public.

The FCC further refined its conception of the public interest in 1960. In an effort to assist private licensees to develop programming that better served the public interest, the FCC delineated fourteen specific factors which constitute "[t]he major elements usually necessary to meet the public interest, needs and desires of the community."[111] "The principal ingredient of such [public interest] obligation consists of a diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his [or her] service area."[112]

In addition to the above guidelines regarding programming, the FCC made general statements regarding commercials. The FCC said that broadcasters should "take all reasonable measures to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages."[113]

In short, the FCC had set forth programming and advertising standards which licensees must meet to comport with the public interest. In contrast to the specific programming standards, the advertising standards were very general. It is clear, however, that the FCC still considered the public interest to be furthered by a minimization of commercial time and commercial interruptions.

The FCC specifically defined these guidelines in 1970, when it informally adopted a maximum limit on total commercial

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110. *Id.* at 192.

111. Report and Statement of Policy Res, *supra* note 98, para. 39. Such elements were enumerated:

> (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programs.

Id.

112. *Id.* para. 32.

113. *Id.* para. 36.

time.[114] Later, the FCC formally adopted the standards[115] and the codification of these rules[116] and prescribed the maximum total commercial time allowable on both radio and television.[117] The guidelines permitted a television station to broadcast a maximum of sixteen minutes of commercials during each hour.[118]

Additionally, in 1974, the FCC stated that

> [w]hile it is recognized that advertising is the sole economic foundation of the American commercial broadcasting system and that continued service to the public depends on broadcasters' ability to maintain adequate revenues with which to finance programming, the Commission has a responsibility to insure that the "public interest" does not become subordinate to financial and commercial interests.[119]

Thus, throughout the history of broadcast regulation, the regulating authority consistently viewed advertising as an imposition on the public interest. Until the deregulation of radio

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114. This development is described in Deregulation of Radio, Notice of Inquiry and Proposed Rule Making, 73 F.C.C.2d 457, para. 46 (1979) (letter of the Chief of the Broadcast Bureau to WXCL) [hereinafter cited as Notice of Inquiry].

115. Delegation of Authority, Order, 43 F.C.C.2d 638 (1973).

116. 47 C.F.R. § 0.281(a)(7)(i)-(v) (1983). These regulations were amended, but can be found at 47 C.F.R. § 0.283(a)(6) (1984). The amended regulations applied only to television and allowed 20 minutes of advertising during 10% of the day in periods of high demand for political advertising. The FCC recently repealed the amended regulations. *See infra* notes 148-71 and accompanying text.

117. Notice of Inquiry, *supra* note 114, at 477 n.92 (text of old regulation). These regulations took the form of guidelines imposed on the Broadcast Bureau. (There were also programming guidelines which are not relevant to this note.) The FCC delegated to the Broadcast Bureau authority to approve renewal or granting of licenses unless the licensee proposed to broadcast more than 16 minutes of commercials each hour. Any application failing to meet these standards had to be reviewed by the entire Commission, rather than the Broadcast Bureau, before it could be approved. These guidelines were intended to be mere procedural guidelines, but they evolved into *de facto* regulations. For example, the FCC said, "We begin our review of the programming and commercialization guidelines by reiterating that the guidelines as written are theoretically procedural. However, it is clear that the delegations have taken on substantive overtones, at least in the minds of commercial broadcasters." Revision of Commercialization Policies, *supra* note 22, at 37,239, 37,246. The Commission also noted, "The substantive significance of the guidelines is further highlighted by the fact that the Commission has deferred to licensee discretion whenever the guidelines have been met, even in the context of highly contested proceedings. *See, e.g.*, KCOP Television, Inc., 71 F.C.C.2d 1430 (1979); Commercial Radio Institute, Inc., 43 Rad. Reg. 2d 1247 (1978); Turner Communications, 46 Rad. Reg. [2d] 1646 (1980)." *Id.* at 37,246 n.33. Thus, although the 16-minute limit is technically a procedural guideline, broadcasters regard it as regulation.

118. Notice of Inquiry, *supra* note 114, at 477 n.92.

119. Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 9 (1974).

and television,[120] the FCC has viewed advertising as an intrusion that has been tolerated because it was necessary to support the programs.

VI
Conflicting Standards of Public Interest

It appears that two different standards of the public interest have been applied to the television industry. Under the antitrust standard, the public interest is served by increasing competition in the industry. In contrast, the Communications Act standard of public interest governing the broadcasting industry is much broader. This broader definition of public interest seeks to maximize the pleasure and benefit the public derives from the necessarily commercialized broadcasting industry.[121]

Two of the challenged NAB Code restrictions—the interruption and time standards[122]—arguably served the public interest as traditionally defined by the FCC.[123] The time standard voluntarily limited the "total time devoted to commercials." As the court in *Broadcasters I* recognized, the FCC has treated compliance with the NAB's time standards favorably in evaluating compliance with the stations' public interest requirement when considering applications for license renewal.[124] Similarly, the interruption standard furthered an expressed policy of the FCC by reducing "the frequency with which regular programs are interrupted for advertising messages."[125] A reduction in total time devoted to commercials will likely increase viewer benefit and pleasure.

It is important to note that in deciding the motion for summary judgment, the court did not rule that the interruption and time guidelines damaged the interest in competition; rather, the court reserved that question for trial.[126] Nonetheless, with the elimination of the NAB's standards after *Broadcasters I*

120. *See infra* notes 131-71 and accompanying text.

121. NBC v. United States, 319 U.S. 190, 216-17 (1943). *See also* Report and Order, 84 F.C.C. 968, app. D, para. 4 (1981) ("Although the public interest has many elements, the primary objective is broadcast service responsive to the wants and needs of the public—what economists call consumer satisfaction.").

122. *See supra* text accompanying notes 53-54.

123. *See supra* notes 93-120 and accompanying text.

124. *Broadcasters I*, 536 F. Supp. at 169 (1982). *See, e.g.*, *In re* NBC, 20 F.C.C.2d 1, para. 12 (1974).

125. *See supra* note 113 and accompanying text.

126. *Broadcasters I*, 536 F. Supp. at 158-59.

and *Broadcasters II*, it would appear that the antitrust public interest standard, requiring increased competition at all costs, outweighs the broader public interest which governs the broadcasting industry.

In short, a rigid application of the antitrust laws abolished the industry-imposed standards that promoted the public interest as then defined by the FCC. Certainly, these restraints may have reduced competition in the industry;[127] however, the irony is that one branch of government has frustrated the stated goals of another. Not only has a correct application of the antitrust laws damaged the goals of the FCC, but it has interfered with the public interest promoted by the Communications Act.

The multiple-product standard is less defensible than the time and interruption standards. The NAB asserted that the multiple-product standard reduced "clutter" in the same way that the interruption standard lessened it.[128] The FCC has not expressed a policy that specifically encourages restricting thirty-second commercials to the advertisement of a single product, as it has done with the time and interruption standards. Since the multiple-product standard is the only one of the standards which does not further a goal explicitly encouraged by the FCC, it appears that the Communications Act public interest standard has been damaged the least by its abolition.

Nevertheless, the broader standard of public interest has been damaged by application of the antitrust laws. The finding of the court that the multiple-product standard was unreasonable per se does not necessitate a conclusion that it was contrary to the Communications Act public interest standard. Yet, in an effort to prevent further antitrust action, the NAB has abandoned the Code in its entirety.[129] Thus, the courts in *Broadcasters I* and *Broadcasters II* have replaced a broad, flexible standard of public interest with a narrow, rigid standard, i.e., competition. As a result, competitive forces may actually deter individual broadcasters from serving the public interest

127. That issue, however, was never resolved by the court. *Id.*

128. *Id.* at 166 n.73. The court defined "clutter" as "the practice of scheduling an excessive number of separate non-program announcements consecutively within a single interruption as well as . . . an excessive number of program interruptions." *Id.*

129. 104 BROADCASTING, Jan. 3, 1983, at 58.

as traditionally defined by the FCC.[130]

Due to the recent deregulation of the radio and television industries, it might be argued that the FCC's historical aversion to television commercialization has changed since *Broadcasters I* and *Broadcasters II*.[131] The efforts to deregulate television advertising proposed soon after *Broadcasters II* are based on the theory that market forces can effectively regulate advertising excesses.[132] Nevertheless, in deregulating television advertising,[133] the FCC has not posited that commercialization promotes the public interest; rather, it has simply decided that its regulations may not be necessary to determine the *maximum* level of commercialization that is consistent with the public interest.[134] Levels of advertising below the maximum which the market forces will allow still further the public interest. Accordingly, the Code would have continued to serve the FCC's public interest if it kept commercialization lower than the maximum level allowed by market forces, just as it furthered the public interest by keeping commercialization below the FCC's sixteen-minute commercial guideline. Thus, the public interest of the antitrust laws which bars such private regulation can be viewed as inconsistent with the public interest of the broadcasting industry, even in a deregulated industry.

VII
The Effect of Broadcasters on Deregulation of the Television Industry

The deregulation of radio is significant because it foreshadowed the recent deregulation of television. In addition, the FCC used the same economic model that it applied to radio to justify its efforts to deregulate television. Thus, a brief discussion of radio deregulation is necessary to place the deregula-

130. The NAB argued "at great length and with considerable vigor" that elimination of the time standards would inevitably lead to "a substantial increase in the television time allotted to commercials or regulatory action by the Federal Communications Commission." *Broadcasters I*, 536 F. Supp. at 166. By implication, the NAB argued that an increase in competition would lead to an increase in commercialization.

131. *See infra* text accompanying note 170.

132. *See infra* notes 137-42 and accompanying text.

133. Final Rule, *supra* note 4.

134. *See infra* notes 137-42 and accompanying text.

tion of television in the proper context and to assess the ramifications of *Broadcasters I* and *Broadcasters II*.

A. Public Interest Considerations Involved in the Deregulation of Radio

In 1979, following the recent impetus to deregulate,[135] the FCC abolished the specific advertising and programming guidelines insofar as they pertained to commercial radio.[136] To justify its removal of the restrictions, the FCC used a newly adopted economic model which predicts that marketplace forces will adequately restrict the maximum total commercial time to a level which serves the public interest.[137] According to this theory, market forces would work through actual listener choice; the public would not listen to an overly commercialized station, thereby prompting such a station to reduce its commercial level in order to compete for its audience.[138] Accordingly, the FCC stated that

> the key issues to consider in this proceeding are who is best able to determine the wants and needs of radio audiences and, once these wants and needs are recognized, what forces are most likely to lead licensees to be responsive to them. The economic model suggests that, given the status of radio broadcasting today, the marketplace and competitive forces are more likely to attain these public interest objectives than are regulatory guidelines and procedures.[139]

In other words, market forces can set maximum levels of commercialization more efficiently and effectively than can the FCC. According to the FCC, this action did not constitute a reversal of the FCC's past determination that commercials are

135. Notice of Inquiry, *supra* note 114, para. 3 at 459 n.4. Noting that the President had ordered executive agencies to delete unneeded regulations, the Commission stated, "Although this Order does not apply to the Commission, which is not an Executive Agency, it clearly evidences a national policy to reduce the burdens imposed by unnecessary governmental regulations." *Id.*

136. *In re* Deregulation of Radio, Report and Order, 84 F.C.C.2d 968 (1981) [hereinafter cited as Report and Order]. *See also In re* Deregulation of Radio, Memorandum Opinion and Order, 87 F.C.C.2d 797 (1981) [hereinafter cited as Reconsideration Order].

137. Report and Order, *supra* note 136, app. D, para. 4. For an enlightening argument supporting a "marketplace" approach to broadcast regulation, see Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). The article was written by the chairman of the FCC and his assistant. It provides excellent insight into the rationale of the FCC as a whole.

138. Report and Order, *supra* note 136, para. 5 at 1023.

139. *Id.* para. 4.

not in the public interest. The FCC simply changed its method of determining how much commercial time achieves this goal.[140]

Although the economic model adopted by the FCC was strongly and cogently attacked by those who opposed deregulation,[141] the FCC ordered removal of the restrictions.[142] The strongest criticism of the model focused on the model's failure to consider the government-imposed scarcity of broadcasting licenses.[143] However, the FCC concluded that the scarcity rationale no longer justified regulating total commercial time.[144] The FCC stated that the dramatic increase in the number of radio stations since passage of the Communications Act has eliminated the need for public interest regulations that were deemed necessary in 1927.[145] The FCC noted that, while there were only 681 radio stations in 1927, there were 8654 radio stations in 1979.[146] The increased number of stations, the FCC concluded, permits the marketplace to determine the "public interest," whereas the paucity of stations in 1927 required the government to impose its own conception of the standard.[147]

B. Broadcasters and Deregulation of Television Advertising

Since *Broadcasters I* and *Broadcasters II* were decided, the FCC has abolished many of its regulations pertaining to televi-

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140. *Id.*

141. *Id.* paras. 11-51.

142. One portion of this deregulatory order was overturned by the federal court of appeals. Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983). The court held that the FCC's decision to eliminate programming logs was not justified by the FCC's reasoning and analysis. *Id.* at 1439. Although programming logs are not relevant to this note, this aspect of the case illustrates that the FCC must satisfy at least *some* minimal standard of judicial review. The court stated that the FCC must show that "all relevant factors and available alternatives were given adequate consideration." *Id.* at 1426. It held that the FCC should have at least considered adopting a modified form of programming logs. *Id.* at 1439.

Significantly, however, the court upheld the Commission's decision to deregulate radio advertising. The court stated that "the Commission acted well within its discretion by concluding from the record and its own experience that it is the marketplace and not regulation that has kept down the level of commercialization." *Id.* at 1438. Thus, unless a court determines that the NAB Code was a relevant factor, and that the FCC failed to consider it in deciding whether to deregulate advertising, it seems unlikely that a court will overrule an FCC decision to deregulate television advertising.

143. Report and Order, *supra* note 136, paras. 14-18.

144. *Id.*

145. Notice of Inquiry, *supra* note 114, para. 56.

146. *Id.*

147. Report and Order, *supra* note 136, para. 15.

sion.[148] This multifaceted ruling eliminates all specific restrictions on the total amount of television advertising.[149]

In its proposal, the FCC explained its rationale for deregulating television.[150] As with the deregulation of radio, the perceived national policy favoring deregulation prompted the FCC to propose the elimination of many of its television regulations.[151] Also, the FCC stated that the development of alternative video media, such as cable television, subscription television, and video recorders, has subjected the television broadcasting industry to competitive pressures that were not previously present.[152] This increased competition has diminished the need for regulatory control.[153]

The FCC based its proposal to eliminate restrictions on advertising on statistical data which show that the total commercial time of certain television stations was almost always well below the imposed limit.[154] Based primarily on these statistics, the FCC concluded that competitive pressures regulate total commercial time more effectively than does the FCC sixteen-minute guideline. The FCC stated, "These figures indicate, we believe, that market forces are acting to hold commercial practices far below the guidelines set out in our delegations. If, in fact, this is true, there may be no further utility in preserving

148. Final Rule, *supra* note 4.

149. *Id.* app. A. The Final Rule also eliminated or modified several other major regulations. These include: (1) the "Ascertainment Requirement," which requires broadcasters to survey their communities to ascertain the problems of the communities, and then demonstrate to the FCC that they adjusted their programming to meet those needs; (2) the "Program Log" requirement, which requires broadcasters to maintain detailed records concerning programs and commercials that they have broadcast; and (3) the "Programming Requirements," most of which are described *supra* note 111.

150. Revision of Commercialization Policies, *supra* note 22, paras. 58-59.

151. *Id.* para. 36.

152. *Id.* paras. 26-32.

153. *Id.* para. 35.

154. *Id.* para. 46. The statistical data on which this conclusion is based were derived from an analysis of 60 television stations in Florida, Georgia, and Alabama. *Id.* Of the 60 stations analyzed, 55 stations were network affiliates and 5 were independent stations. *Id.* at 37,254. The FCC selected these stations for the sample because they had recently applied for license renewals; accordingly, their programming logs were easily accessible. The statistics showed that network affiliates rarely exceeded the NAB Code limit of 9½ minutes of commercials per hour during prime time. *Id.* In addition, the network affiliates averaged less than 13½ minutes or 11 minutes per hour throughout the entire day. *See infra* text accompanying notes 164-67. In comparison, the independent stations averaged about 8½ minutes of commercials per hour each day. Revision of Commercialization Policies, *supra* note 22, app. C. The FCC noted that broadcasters exceeded the 16-minute guideline during only .33% of total broadcast hours for all 60 stations. *Id.* para. 46.

those guidelines."[155]

Apparently, the FCC reasoned that only market forces were responsible for keeping commercial time below the sixteen-minute limit. The FCC asserted that two other factors supported this conclusion.[156] First, broadcasters had voluntarily complied with the FCC policy regarding commercialization during children's programs.[157] Second, the number of consumer complaints regarding excessive commercialization had decreased.[158]

In its proposal, the FCC did not seriously consider the possibility that the NAB Code, rather than market forces, might be responsible for the low levels of commercials. In its *Final Rule*, the Commission perfunctorily dismissed comments that suggested that the Code might have significantly affected the statistics reported by the Commission.[159] Arguably, however, the Code provides a far more obvious and logical explanation for the relatively low levels of total commercial time. The statistical sample compiled by the FCC consisted of fifty-five network affiliated stations and five independent stations.[160] Since the three major networks subscribed to the Code,[161] presumably their affiliates subscribed to the Code as well. The FCC recognized that these network affiliates balance their local commercials with the commercials of the network so as not to exceed the NAB Code prime time advertising standards. The FCC noted, "as more time is accounted for by network commercials, less time can be apportioned to local commercials since the station must not exceed an upper constraint of either 9 minutes, 30 seconds for NAB's prime time limit nor the FCC guideline of 16 minutes."[162]

Realistically, the FCC sixteen-minute limit would almost never be exceeded during prime time because the stations were constrained by the Code's nine and one-half minute maximum. Similarly, the Code restricted total commercial time during children's viewing hours to twelve minutes per hour, Monday through Friday, and nine and one-half minutes per

155. *Id.*
156. *Id.* para. 47.
157. *Id.*
158. *Id.*
159. Final Rule, *supra* note 4, para. 64.
160. Revision of Commercialization Policies, *supra* note 22, app. C.
161. *Broadcasters I*, 536 F. Supp. at 152.
162. Revision of Commercialization Policies, *supra* note 22, app. C.

hour on Saturday and Sunday.[163] In short, the NAB Code prime time and children's advertising standards constituted substantial restrictions on the total amount of advertising time.

Perhaps the factor which most strongly supports the FCC's hypothesis is that, *on average*, total advertising time is below the maximum levels permitted by the FCC. The FCC calculated that the *average* total advertising time during the sample period was either thirteen and one-half minutes per hour or eleven minutes per hour, depending on the mathematical method used to calculate the average.[164] It is potentially very misleading, however, to argue that market forces must be keeping advertising time down because, *on average*, total time is below the sixteen-minute guideline. *Average* time does not illustrate the effects of market forces. What is illustrative is whether, *at any given time*, total advertising time is substantially below the maximum limit in force during that time period. Obviously, broadcasters that comply with the lower Code limits will *average* less than sixteen minutes per hour over the course of the day, but this lower average is not a result of market forces. A station might broadcast sixteen minutes of commercials most hours, but comply with the lower Code time limits during the other hours (prime time, for example). On average, the station would be broadcasting less than the FCC's sixteen-minute limit; yet, at any given time, the station would be broadcasting the maximum commercial time allowable under the Code. Therefore, the Code, and not market forces, may explain why average commercial time is below the FCC limit.

A hypothetical situation will illustrate this point. Assume, as did the FCC, that a typical network affiliate broadcasts twenty hours each day.[165] During the twenty-hour day, the broad-

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163. CODE, XIV(2)(c), *reprinted in* Kahn, *supra* note 8, at 591. Children's viewing hours are defined by the Code as "those hours other than prime time in which programs initially designed primarily for children under 12 years of age are scheduled." *Id.*

164. Revision of Commercialization Policies, *supra* note 22, app. C. Under the first method, the FCC added the average of local commercials each hour (5 minutes) to the average network-generated commercials each hour (8½ minutes): thus, 13½ minutes per hour. The second method, which the FCC considered to be more accurate, consisted of adding the average local commercial time each day to the average network-generated commercial time each day, and then dividing the sum by the average number of hours broadcast by an affiliate each day. Under the second method, stations broadcast an average of 10 minutes, 52 seconds of commercials each hour. *Id.*

165. *Id.*

caster complies with the NAB prime time restrictions, which affect three hours each day.[166] In addition, assume that the broadcaster designates as children's viewing hours five hours each Saturday and Sunday, and four hours each weekday. The broadcaster also complies with NAB time standards during the children's viewing hours. Lastly, assume that the station broadcasts the maximum sixteen minutes of commercials per hour at all other times. Such a station would, *on average*, broadcast fourteen minutes of commercials each hour over the course of the day.[167] This figure is quite close to the thirteen and one-half minute per hour average observed by the FCC, although it is somewhat higher than the other figure of eleven minutes.

Even if the assumptions in the hypothetical are modified, the point remains that factors other than market forces may explain the relatively low levels of commercialization that were observed by the FCC. By themselves, the NAB restrictions account for a substantial portion of low time for total advertising.[168] In addition, the FCC's historical aversion to commercialization[169] may have fostered levels of total advertising below the sixteen-minute guideline; broadcasters may have

166. *See supra* note 53.

167.

Time Period	hours daily	days per week	max. commercial time allowed	total no. commercial minutes allowed weekly in time period
prime time	3	7	9.5	199.5
children's viewing hours	4	5	12.5	250.0
(weekend)	5	2	9.5	95.0
other hours				
(weekday)	13	5	16.0	1040.0
(weekend)	12	2	16.0	384.0
totals	20	7	-	1968.5

1968.5 (total minutes of advertising allowed during the week) divided by 140 (total broadcasting hours in a week) = 14.06 (average minutes of advertising each hour).

168. *See supra* notes 165-67 and accompanying text.

169. *See supra* text accompanying notes 93-120.

desired a "margin of error" to avoid public interest concerns when they applied for license renewal.

These two alternative explanations undermine the FCC's conclusion that market forces are more effective than regulations in maintaining reasonable levels of advertising. Therefore, the FCC should not have based its decision to deregulate television advertising on statistics which did not clearly demonstrate that market forces sufficiently regulate advertising.

This caveat is especially important now because neither the Code nor the FCC currently regulates the overcommercialization of television. The NAB abandoned the Code in 1982.[170] Without the Code, the prime time and children's viewing hours time limits will no longer require low levels of advertising during those hours. In addition, broadcasters may view the deregulation as a reversal of the FCC's traditionally active involvement in the regulation of advertising and will no longer limit commercials, as they had in the past, to avoid violating their public interest requirement under the Communications Act.[171] Without these two restraining forces, the low levels of advertising previously observed may disappear.

VIII
Suggested Regulatory Changes

Removal of the Code restrictions should prod the FCC into taking one of two possible courses of action. First, the FCC might temporarily replace the NAB's Code standards with regulations of its own, although it is unlikely that the FCC would follow such a course. Alternatively, the FCC could initiate a study of advertising practices which have developed following removal of the Code restrictions. Such a study would more accurately indicate whether deregulation is advisable.

170. 104 BROADCASTING, Jan. 3, 1983, at 58.

171. Under one proposed option, the FCC stated that it "no longer would consider in any fashion a television broadcaster's commercial load. This option is premised on the belief that competition within the video marketplace will serve as an adequate regulator of commercialization." Revision of Commercialization Policies, *supra* note 22, para. 58. The FCC apparently adopted this approach. Final Rule, *supra* note 4, paras. 64-67. The FCC also considered raising the 16-minute guideline or applying the existing guideline during only parts of the day. Revision of Commercialization Policies, *supra* note 22, para. 59.

A. The Creation of FCC Advertising Standards

Although the FCC approved of the NAB interruption standard and clearly viewed limitations on overcommercialization as proper, the FCC has never adopted explicit guidelines as restrictive as those of the Code. Perhaps the FCC believed that specific guidelines would hamper its ability to tailor the public interest requirement of each station to the needs of the community in which the station operates. Alternatively, the absence of specific guidelines could be a manifestation of the FCC's concern that providing excessively specific guidelines would infringe on the first amendment rights of broadcasters.[172] Indeed, the Supreme Court has encouraged the FCC to remain flexible in regulating broadcasters:

> In this sensitive area so sweeping a concept of governmental action would go far in practical effect to undermine nearly a half century of unmistakable congressional purpose to maintain—no matter how difficult the task—essentially private broadcast journalism held only broadly accountable to public interest standards. To do this Congress, and the [Federal Communications] Commission as its agent, must remain in a posture of flexibility to chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media.[173]

The court in *Broadcasters I* viewed private control by the NAB as a violation of the antitrust laws. Indeed, it is difficult to imagine meaningful private control which would not violate the antitrust laws. Without private or public regulation, commercialization will likely increase, possibly damaging the public interest.

The FCC could adopt regulations which set forth maximum limits on the total time devoted to commercials and the number of commercials allowable each hour. Although similar in nature to the restrictions abandoned by the NAB, FCC time and interruption standards would be superior to the former Code standards in several respects. Most importantly, the standards would be adopted, pursuant to statutory guidelines, after much public input. Arguably, the proper balance be-

172. Report and Statement of Policy Res, *supra* note 98, at 2313. *See also infra* note 179.

173. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 120 (1973). The "sweeping . . . concept of governmental action" referred to the appellant's allegation that the actions of licensed broadcasters constituted government action. The Court disagreed with this contention.

tween profits and public interest could be more objectively determined by a public agency than by a trade association directly interested in higher profits.[174] Presumably, the FCC would give the viewers' interests more weight in setting time and interruption standards than would the NAB.

As a federal agency, the FCC could impose a multiple-product standard if it determined that such a standard was in the public interest, as the NAB had argued, without violating the antitrust laws.[175] Again, the anti-competitive effects of such a standard could be carefully weighed in public hearings held by a public agency, rather than by agreement among members of a private trade association.

Regulations promulgated by the FCC would surely protect the public interest better than the private agreements of the NAB. Furthermore, the FCC should not restrict consideration of new standards to those adopted in the Code. Having been tested and applied since 1952, the NAB standards appear to be the most obvious and workable types of advertising standards. However, the FCC should evaluate many alternatives submitted during extensive public hearings. In this way, the interests of the public can be openly balanced against the broadcaster's needs.

It seems very unlikely, however, that the FCC will adopt such regulations. The FCC is aggressively trying to eliminate or reduce regulations.[176] Adopting new regulations would be contrary to this trend. Furthermore, the FCC has previously rejected proposals to adopt restrictions similar to those of the NAB.[177] Thus, although such regulations would serve the public interest, it seems unlikely that the FCC would adopt them.

B. Advertising Practices Revisited

Alternatively, the elimination of the Code presents the FCC with an opportunity to study the effects of removing an extensive system of advertising restrictions and to isolate the effects of marketplace control. The FCC should specifically inquire:

174. A 1972 FCC study, however, found that NAB restrictions on total advertising time *decreased* the revenues of broadcasters. Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 12 (1972). This result would indicate that the NAB instituted the Code restrictions to avoid FCC regulation, rather than to increase their revenues.

175. *Broadcasters II*, 553 F. Supp. at 625.

176. *See supra* notes 131-71 and accompanying text.

177. *In re* Adoption of Standards for the Elimination of Television Overcommercialization in the Public Interest, 49 RAD. REG. (P & F) 2d 391 (1981).

1. Has total commercial time increased?
2. Have commercial interruptions increased?
3. Has "clutter" increased?
4. What effect has removal of the Code had on children's advertising?
5. Have the ethics imposed on broadcasters by the Code disappeared along with the Code?

Rarely has a regulatory agency had such an opportunity to observe the effects of removing regulations. The FCC can effectively compare the nature of advertising under the highly organized set of regulations with the nature of advertising constrained only by market forces.

Such a study would provide the FCC with an intelligent basis for deciding whether to maintain its deregulated posture regarding television advertising. For example, the FCC might find that there were few changes in advertising practices after the elimination of the Code. Such a finding would suggest that market forces do, indeed, control advertising practices and that the FCC could safely loosen its costly regulatory system without damaging the public interest. Alternatively, the FCC might find that only certain aspects of current advertising practices require regulation to protect the public interest. The FCC could then accurately target regulations to those practices that the marketplace does not control, while leaving other areas unregulated. Such a study would clearly test the advisability of the Commission's deregulation of television advertising.

Unlike the statistics reported by the FCC in conjunction with its proposal to deregulate television advertising,[178] a post-Code study would be unaffected by the Code's total time restrictions and the perceived FCC attitude of discouraging advertising. Statistics obtained after the elimination of the Code and after the FCC's recent tolerance for increased commercialization would truly reflect the way in which the market forces control total advertising time.

This note does not suggest that the FCC abandon its deregulation of television advertising. Indeed, the FCC should eliminate its costly regulations if market forces will keep advertising at acceptable levels. The FCC should, however, reevaluate its decision to deregulate television advertising until it has had an opportunity to study advertising levels which

178. Revision of Commercialization Policies, *supra* note 22.

have existed since the Code's elimination. Only since the Code's elimination has the FCC had the opportunity to accurately study the effects of market forces.

IX
Conclusion

Although the FCC has never imposed advertising guidelines as restrictive as those of the NAB Code, the FCC has, until recently, remained resolute in its opposition to excessive commercialization. In the absence of specific FCC guidelines, the broadcasters developed their own guidelines regarding commercial advertising. Tacitly approved by the Commission, the Code guidelines allowed broadcasters to maximize profits within certain parameters without having to jeopardize their precarious licenses. Although the degree to which the FCC actually approved of the Code standards is unclear, the FCC never disapproved the standards, despite numerous opportunities to do so. It appears that the FCC gratefully allowed the NAB to promulgate regulations that it was unwilling to impose on the industry.[179]

In approving the elimination of the NAB Code standards,

179. Indeed, Writers Guild of Am. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated on other grounds*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980), also illustrates the symbiotic relationship which exists at times between the FCC and the NAB. In *Writers Guild*, the trial court found that the FCC had successfully pressured the NAB into adopting a "family viewing hours" policy, which the FCC itself was unwilling to impose on broadcasters. The court stated:

> The court finds that Chairman Wiley in the course of his campaign threatened the industry with regulatory action if it did not adopt the essence of his scheduling proposals. On some occasions, when the persuasive demands of the situation so dictated, he would withdraw his threats or assume a low profile. But the Commission's pressure in this case was persistent, pronounced, and unmistakable. Chairman Wiley's actions were the direct cause of the implementation of the family viewing policy: were it not for the pressure he exerted, it would not have been adopted by any of the networks nor by the NAB. The threat of regulatory action was not only a substantial factor leading to its adoption but a crucial, necessary, and indispensable cause.

423 F. Supp. at 1094.

The NAB Family Viewing Policy prevented NAB members from televising "[e]ntertainment programming inappropriate for viewing by a general family audience . . . during the first hour of network entertainment programming in prime time and in the immediately preceding hour." *Writers Guild*, 423 F. Supp. at 1072 (quoting NAB, The Television Code 2-3 (18th ed. June 1975)). A congressional committee had pressured the FCC to regulate violence and obscenity on television, but the FCC decided that it would only impose such regulations indirectly because the Commission feared that the rules would constitute infringements on first amendment rights and 47 U.S.C.

Broadcasters II illustrates the ironic and probably unintended results which occur when courts interpret one statutory scheme without regard to other articulated public policy goals. The antitrust laws mandate a narrow definition of public interest, even at the expense of the public interest served by the Communications Act. Although *Broadcasters I* and *Broadcasters II* had the undesirable effect of damaging a broader public interest, it is possible that the decision may yet have some unintended, but beneficial, results.

Most significantly, *Broadcasters I* and *Broadcasters II* may force the FCC to reassume its statutory role as the arbiter of the public interest—a function which the NAB had, in essence, performed for the FCC in the area of advertising. By preventing the NAB from developing and enforcing industry standards regarding advertising practices, the court has, perhaps inadvertently, forced the television industry to look once again to the FCC for the meaning of public interest in this area. However, *Broadcasters I* and *Broadcasters II* have thrust this duty upon the FCC at a time when the Commission is trying to delegate this decision-making function to the marketplace. Thus, the benefits that might result from forcing the public interest determination back to a public agency may be lost.

§ 326. *Id. See also* Writers Guild of Am. v. American Broadcasting, 609 F.2d 355, 359 (9th Cir. 1979).

The trial court in *Writers Guild* noted that the NAB could have imposed similar regulations on its own initiative; however, the FCC was so extensively involved with the creation of the NAB regulations, *see, e.g., Writers Guild*, 423 F. Supp. at 1094-1120, that the NAB regulations represented state action. Accordingly, the family viewing policies constituted government censorship in violation of the first amendment. *Writers Guild*, 423 F. Supp. at 1140-43. That court's decision was vacated, however, on the grounds that the FCC, not the federal courts, had jurisdiction over the plaintiff's complaints. Writers Guild of Am. v. American Broadcasting, 609 F.2d at 358.

Children's programming policies also illustrate this symbiotic relationship between the FCC and NAB. While the FCC was considering whether to place strict limits on advertising during children's viewing hours, the NAB adopted its own limits on advertising during children's viewing hours. The Commission observed:

> Recently, following extensive discussions with the Commission's Chairman, the National Association of Broadcasters agreed to amend its code to limit non-program material on children's programs to nine minutes and thirty seconds per hour on weekends and twelve minutes during the week by 1976; the Association of Independent Television Stations (INTV) has agreed to reduce advertising voluntarily to the same level. By these actions the industry has indicated that these are advertising levels which can be maintained while continuing to improve service to children.

Children's Television Report and Policy Statement, 50 F.C.C. 1, para. 39 (1974). Thus, in several instances, the FCC has imposed regulations on the television industry informally by pressuring various industry trade associations.

Moreover, the FCC's justification for delegating public interest decisions regarding television advertising to the marketplace has been undermined by the removal of the Code. The FCC's study attributing low levels of advertising to market forces failed to consider the effects that the Code may have had on these levels. Elimination of the Code has now changed the nature of the forces controlling advertising practices.

The FCC's recent deregulation of television advertising represents a dramatic deviation from the FCC's traditional policies regarding television advertising. In light of the FCC's traditional concern with overcommercialization, it seems quite possible that the current fervor to deregulate advertising may not last beyond the terms of the current commissioners. The compelling logic that has traditionally justified minimizing commercial excesses may reemerge once the current political climate encouraging deregulation has changed; when it does, the FCC may wish to revitalize regulation of advertising as a means of promoting the public interest.

If the FCC reinstitutes control over advertising at some later time, it may ameliorate some of the damage to the public interest which was caused by *Broadcasters I* and *Broadcasters II.* If the FCC does not reassert control over television advertising, *Broadcasters I* and *Broadcasters II* may have damaged the public interest in two ways: the possible increase in commercialization will decrease viewer enjoyment, and removal of the Code will have undermined the FCC's basis for proposing deregulation.

Thus, whether *Broadcasters I* and *Broadcasters II* ultimately damage or benefit the public interest, beyond the narrow scope of the antitrust conception of public interest, depends on FCC reactions to the *Broadcasters* decisions. Hopefully, the FCC will reevaluate its policies in light of the changes caused by removal of the NAB Code.